# Petition

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81-1528

No.

IN THE
SUPREME COURT OF THE UNITED STATES

GARY LEE,

Plaintiff-Petitioner,

v.

THE STATE OF MONTANA,
Defendant-Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF MONTANA

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February 1982

## THE QUESTION PRESENTED

The Supreme Court of the State of Montana has declared that a certain state statute is unconstitutional, but has nevertheless postponed the effective date of its decision, permitting the unconstitutional statute to remain in full force and effect for up to two years from the actual date of its decision. Is this constitutional?

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Section 61-8-304, Montana Code Annotated

No.

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IN THE
SUPREME COURT OF THE UNITED STATES

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GARY LEE,

Plaintiff-Petitioner,

v.

THE STATE OF MONTANA,
Defendant-Respondent.

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PETITION FOR A WRIT OF CERTIORARI
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STATE OF MONTANA

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The Petitioner, Gary Lee, requests the United States Supreme Court to issue a writ of certiorari to review the Opinion of the Montana Supreme Court dated October 22, 1981 and Order of the Montana Supreme Court dated November 18, 1981.

## OPINIONS AND DECISION BELOW

A. Decision by the Eighth Judicial District Court of the State of Montana, in and for the County of Cascade,

dated December 30, 1980 declaring Section 61-8-304 of the Montana Code Annotated (the Montana statute creating the state 55 MPH maximum highway speed limit law) unconstitutional. (Unreported decision).

B. Opinion of the Supreme Court of the State of Montana dated October 22, 1981, declaring Section 61-8-304 M.C.A. unconstitutional, but postponing the effective date of the decision for approximately two years until October 1, 1983 or until such earlier date as the state legislature might enact and the governor approve a constitutional statute covering the same subject matter. (Reported decision, reported in advance sheets as 635 P2d 1282 (1981).

C. Order of the Supreme Court of the State of Montana dated November 18, 1981, denying the Petition of the Attorney General of the State of Montana, representing the state of Montana, for rehearing. (Unreported decision, as yet.)

## JURISDICTION

Gary Lee seeks the United States Supreme Court to review the Opinion of the Montana Supreme Court dated October 22, 1981. The Order of the Montana Supreme Court denying the Petition for Rehearing brought by the State of Montana was dated November 18, 1981. This Petition for Certorari was filed less than 90 days from that latter date. Jurisdiction of this Court is based on 28 U.S.C. §1257 (3).

## STATUTORY PROVISION INVOLVED

Section 61-8-304, Montana Code Annotated, provides:

"Declaration of speed limits-exception to the basic rule. The attorney general shall declare by proclamation filed with the secretary of state a

speed limit for all motor vehicles on all public streets and highways in the state whenever the establishment of such a speed limit by the state is required by federal law as a condition to the state's continuing eligibility to receive funds authorized by the Federal Aid Highway Act of 1973 and all acts amendatory thereto or any other federal statute. The speed limit may not be less than that required by federal law, and the attorney general shall by further proclamation change the speed limit adopted pursuant to this section to comply with federal law. Any proclamation issued pursuant to this section becomes effective at midnight of the day upon which it is filed with the secretary of state. A speed limit imposed pursuant to this section is an exception to the requirements of 61-8-303 and 61-8-312, and a speed in excess of the speed limit established pursuant to this section is unlawful notwithstanding any provision of 61-8-303 and 61-8-312."

## STATEMENT OF FACTS

Gary Lee brought a declaratory judgment action before the Eighth Judicial District Court of the State of Montana in and for the County of Cascade requesting the court to declare Section 61-8-304, Montana Code Annotated, the Montana statute creating the 55 MPH maximum state highway speed limit, unconstitutional.

Under Section 61-8-304 M.C.A., the Montana State Legislature directed the Montana Attorney General to set whatever maximum state speed limit was necessary to meet federal requirements under federal law as a condition for the state's continuing eligibility to receive federal highway funds.

Gary Lee argued that in enacting this statute, the Montana State Legislature had made an unconstitutional

delegation of state legislative power to the federal government under Article V Section 1 of the Montana Constitution vesting state legislative power in the state Legislature. He argued that under this statute, the Montana Attorney general has no discretion, but must set the maximum state speed limit at whatever limit the federal government requires for continued receipt of federal highway funds. He further argued that if the federal government changes the required limit, then the Montana Attorney General must automatically change the maximum state speed limit accordingly.

The District Court held that the statute was constitutional, however, on appeal, the Montana Supreme Court in an unanimous full court opinion reversed the lower court and held that the statute was unconstitutional, stating, as set forth on Page A-8 of the Appendix of this Petition for Writ of Certiorari that,

> "A more blatant handover of the sovereign power of this state to the federal jurisdiction is beyond our ken."

However, although the Montana Supreme Court held that the statute was unconstitutional, the Court postponed the effective date of its decision (which was rendered October 22, 1981) as set forth at page A-10 of the Appendix of this Petition for Writ of Certiorari:

> ". . . to October 1, 1983, or to such earlier date as the legislature may enact and the governor approve maximum speed limit legislation comporting with the federal requirements and complying with our state constitution."

The Court then stated in effect that until such date, violations of the 55 MPH maximum speed limit as set by the Montana Attorney General pursuant to the statute shall continue to constitute motor vehicle offenses punishable by law.

The Court stated that it postponed the effective date of its decision to avoid any possibility that the federal government might discontinue any flow of federal highway funds to the state, before the Montana State Legislature might have time to pass a constitutional law meeting the federal requirements.

The Montana Attorney General then brought a petition for rehearing, arguing that the Montana Supreme Court had placed the Montana Attorney General in the untenable position of having to enforce an unconstitutional statute, thereby violating the legal duties and oath of the Attorney General.

Although Gary Lee had requested the Montana Supreme Court to declare the statute unconstitutional and now the Montana Attorney General representing the State of Monana, the other party to the proceeding, then requested the Court to make its decision declaring the statute unconstitutional effective immediately, the Montana Supreme Court denied the Petition for Rehearing.

The end result is simply stated — for up to two years, the public is subject to prosecution for violation of a statute declared unconstitutional by the highest court of the State.

## REASONS FOR GRANTING THE WRIT

The Montana Supreme Court has established a new precedent of overwhelming significance. The Court has held that a court may declare a statute unconstitutional, but nevertheless postpone the effective date of its decision until some time far in the future. In the meantime, the unconstitutional statute remains in full force and effect.

With just a moment's reflection, the far-reaching consequences of such a precedent come in view. What if, hypothetically, a state legislature passes a law authorizing the state government in some manner to seize private property without just compensation? Can the highest court of the state find that the law is unconstitutional, but by post-

poning the effective date of its decision, in effect, permit the unconstitutional confiscation of private property in the meantime until the state legislature can change the unconstitutional part of the law?

What if a state legislature passes a law creating a new criminal offense? Can the highest court of the state find the law unconstitutional for due process reasons of vagueness, but by postponing the effective date of its decision in effect permit the prosecution of the public under the unconstitutional law until the legislature can correct the deficiencies?

The Montana Supreme Court has thus postponed the effective date of its decision holding the statute unconstitutional precisely to allow the continued enforcement of the unconstitutional statute. A court can not constitutionally direct the continued prosecution of the public for violation of an unconstitutional statute, no matter what possible incidental financial benefits there might be to the state.

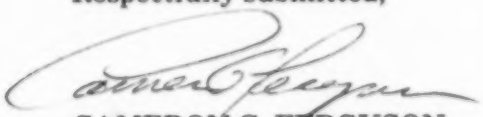
The Montana Supreme Court has thus decided this case in a manner contrary to the due process guarantees of the Fourteenth Amendment of the Constitution of the United States, presenting a claim of federal constitutional rights entitling the United States Supreme Court to review the decision under 28 U.S.C. §1257(3).

Additionally, in its Order of November 18, 1981, the Montana Supreme Court has misconstrued various opinions of the United States Supreme Court. None of the cases cited provide even the slightest justification for the Montana Supreme Court's decision to make a constitutional ruling not just prospective in effect, but entirely inoperative until some time in the future.

The very existence of this precedent by the Monana Supreme Court poses a serious danger to our constitutional system. The Montana Supreme Court has actually suspended the operation of part of the Montana State Constitution. What other court, relying on this Montana case, might find authority to permit or even direct the continued enforcement of an unconstitutional statute by a state government?

There are thus compelling reasons for the United States Supreme Court to grant this request for Writ of Certiorari. The United States Supreme Court simply can not let this precedent stand.

Respectfully submitted,



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February 1982

# Appendix

Appendix A

**SUPREME COURT OF THE STATE OF MONTANA**

NO. 81-63

GARY LEE
Petitioner and Appellant

v

STATE OF MONTANA
Respondent and Respondent

Submitted: Sept. 14, 1981
Decided: Oct. 22, 1981

Appealed from the Eighth Judicial District Court, Cascade County, Hon. Joel G. Roth, Judge

For Appellant: Cameron Ferguson, Great Falls

For Respondent: Mike Greely, Attorney General, Helena
J. Fred Bordeau, County Attorney, Great Falls

Mr. Ferguson argued the case orally for Appellant; Ms. Sarah Power, Law Student, Office of Attorney General, for Respondent

Opinion by Justice Sheehy; Chief Justice Haswell and Justices Daly, Harrison, Shea, Morrison and Weber concurred.

Reversed.

Mr. Justice Sheehy delivered the Opinion of the Court.

Plaintiff Gary Lee filed in the District Court, Eighth Judicial District, Cascade County, his complaint seeking declaratory judgment that section 61-8-304, MCA, is unconstitutional. The District Court held the statute to be constitutional, and entered judgment against Lee. He appeals from the District Court judgment. We reverse the District Court.

The full text of section 61-8-304, MCA, follows:

**"Declaration of speed limits — exception to the basic rule.** The attorney general shall declare by proclamation filed with the secretary of state a speed limit for all motor vehicles on all public streets and highways in the state whenever the establishment of such a speed limit by the state is required by federal law as a condition to the state's continuing eligibility to receive funds authorized by the Federal Aid Highway Act of 1973 and all acts amendatory thereto or any other federal statute. The speed limit may not be less than that required by federal law, and the attorney general shall by further proclamation change the speed limit adopted pursuant to this section to comply with federal law. Any proclamation issued pursuant to this section becomes effective at midnight of the day upon which it is filed with the secretary of state. A speed limit imposed pursuant to this section is an exception to the requirements of 61-8-303 and 61-8-312, and a speed in excess of the speed limit established pursuant to this section is unlawful notwithstanding any provision of 61-8-303 and 61-8-312."

The foregoing statute was enacted by the legislature as a part of Ch. 60, Laws of Montana (1974), where it was denominated section 32-2144.1, R.C.M. 1947. The statute became section 61-8-304, MCA (1978). In 1979, the legislature amended the section slightly in Ch. 421, Laws of Montana (1979), Sec. 66.

The statute was enacted by the legislature in 1974, in response to the Emergency Highway Energy Conservation

Act (Emergency Act) (Pub. L. No. 93-239). In effect, this federal act provided that no federal highway funds should go to any state failing to enact a 55 mile per hour maximum speed limit on its highways.

In section 2 (e) of the Emergency Act, Congress provided that:

"This section shall cease to be in effect (1) on and after the date on which the President declares that there is not a fuel shortage requiring the application of this act, or (2) on and after June 30, 1975, whichever date first occurs."

The provisions of Ch. 60, Laws of Montana (1974), granting the attorney general the power to proclaim a speed limit, became effective March 2, 1974. On that date, the Montana attorney general issued a proclamation "that the maximum speed limit day and night, for all motor vehicles on all public streets and highways in the state of Montana is fifty-five (55) miles per hour, effective midnight, March 2, 1974."

Before the expiration of the Emergency Act, Congress adopted and the President of the United States approved on January 4, 1975, the "Federal-Aid Highway Amendments of 1974," 23 U.S.C. Secs, 101, et seq, (Pub.L. 93-643). This new law provided that a state must have a 55 mile per hour maximum speed limit in order to receive federal funds. The same new law, in section 114 (c), 23 U.S.C. Sec. 154, repealed section 2 of the Emergency Act.

There have been subsequent changes in the federal laws respecting the entitlement of states to federal funds for state highway purposes. The most recent change is Pub.L. No. 97-35, enacted in August 1981. It is enough to say here that as of the time of this opinion, there is still in effect a federal law which conditions the rights of states to receive federal funds for highway purposes upon the adoption of a 55 mile per hour maximum speed limit law.

Since March 2, 1974, no proclamation respecting a maximum speed limit has been issued by any Montana attorney general. The parties have argued pro and con as to the effect of that lack of further proclamation in the light of the repeal of the original speed limit provisions in the Emergency Act. It makes no difference to our decision whether the proclamation of March 2, 1974, became void after the repeal of the original federal law, or whether the attorney general should have issued a new proclamation. We view the provisions of section 61-8-304, MCA, as unconstitutional as originally enacted, and as now provided. We concern ourselves only with two facets of the history of the legislation: (1) The legislature, having met four times since the enactiment of the 1974 legislature, has done nothing about a statewide speed limit except to re-enact section 61-8-304, MCA, in 1979 and, (2) a statewide maximum speed limit of 55 miles per hour is now being enforced in this state under and by virtue of the attorney general's proclamation of March 2, 1974.

Lee argues on appeal that section 61-8-304, MCA, is unconstitutional as an impermissible delegation of the legislative power of the state. The state contends that: (1) Lee has no standing to challenge the authority of the attorney general under section 61-8-304, MCA, and therefore a justiciable controversy is not presented here; (2) the act is valid; (3) the statute may be saved in any event, by severing therefrom the objectionable portions; and, (4) section 61-89-304, MCA, incorporates an existing law and is therefore valid.

We look first to whether Gary Lee has standing to bring this action. In his complaint, he alleges that he is a resident of Fort Shaw, Cascade County, Montana; that he frequently drives a motor vehicle on the highways of this state, particularly Montana State Highway No. 200 and Interstate Highway No. 15 between Fort Shaw and Great Falls, Montana; that the attorney general has issued the proclamation to which we have adverted; that except for such proclamation, he would be entitled to drive a motor ve-

hicle under the provisions of section 61-8-303, MCA, (the basic speed rule) in excess of 55 miles per hour as he was accustomed to doing prior to the issuance of the proclamation.

The state filed a motion to dismiss the complaint, raising the standing of the plaintiff to sue in the action. The District Court denied this motion, and did not treat the subject of plaintiff's standing in its subsequent orders or judgments. The state did not cross-appeal, but we examine the issue of standing in any event under Rule 14, M.R. App. Cov. P.

Lee's complaint is for declaratory judgment. It is brought under the Uniform Declaratory Judgment Act. Section 27-8-101, et seq., MCA. That act provides, in section 27-8-202, MCA:

"Any person ... whose rights, status, or other legal relations are affected by a statute ... may have determined any question of construction or validity rising under the ... statute ... and obtain a declaration of rights, status, or other legal relations thereunder."

The stated purpose of the Uniform Declaratory Judgment Act is remedial. Section 27-8-102, MCA. Its purpose is to settle and to afford relief from uncertainty and insecurity as to rights, status, and other legal relations; and, it is to be liberally construed and administered. Section 27-8-102, MCA.

The test of whether a justiciable controversy exists is set forth in Matter of Secret Grand Jury Inquiry (1976), 170 Mont. 354, 357, 553 P 2d 987, 990. There this Court said:

"First, a justiciable controversy requires that parties have existing and genuine, as distinguished from theoretical, rights or interest. Second, the controversy must be one upon which the judgment of the court may effectively operate, as distinguished from a debate or argument invoking a purely political, administrative, philosophical or academic conclusion. Third, must be a controversy the judicial determination of which will have the effect of a final judgment in law or decree in equity upon the rights, status or legal relationships of one or more of the real parties in interest, or

lacking these qualities be of such overriding public moment as to constitute the legal equivalent of all of them."

It is readily seen that Lee's complaint and attack on the constitutionality of the statute fit all three of the tests. Those tests are supported by a substantial number of cases decided in Montana, all set forth in Secret Grand Jury Inquiry, supra.

In arguing that Lee has no standing to sue in this case, the state relies chiefly upon Chovanak v. Matthews (1948), 120 Mont. 520, 188 P.2d 582. In that case Chovanak attacked a 1945 Montana statute providing for the licensing of slot machines owned and operated by religions, fraternal, charitable and nonprofit organizations. He sued as a resident, citizen and elector. This Court pointed out that he was suing against gambling in general, and said that it appeared from his complaint that slot machines, licensed or unlicensed, were utterly anathema to him. This Court found no controversy between him and the defendants in that case.

On the other hand, Gary Lee is directly affected by the operation of the statute he attacks in this case. His right or privilege to drive a motor vehicle by the basic rule of safety under section 61-8-303, MCA has been adversely limited by the enforcement or threatened enforcement of section 61-8-304, MCA. He wants to drive his motor vehicle as fast as the basic rule allows. The statute he attacks operates against him and all drivers in Montana directly. All members of the driving public have an affected interest under the statute attacked, but that does not mean that no member of that driving public can question the constitutional validity of the statute without being arrested for a violation. The acts of the legislature which directly concern large segments of the public, or all the public, are not thereby insulated from judicial attack. Otherwise, the Uniform Declaratory Judgment Act would become largely useless where a plaintiff proposed to test the constitutional validity of a statute directly affecting him. Gary Lee, an automobile driver on Montana highways, has a personal, direct interest for

which he can claim judicial protection when one Montana statute grants him a right or privilege to drive under basic safety requirements and another statute permits that right or privilege to be delimited without action of the legislature. Were we to hold otherwise, we would deprive Lee of judicial relief, and let stand the conflict that now exists between two enactments of the legislature.

We should also note other conflicts with section 61-8-304 in the statutes. the Department of Highways is given authority to set speed limits in section 61-8-309, MCA, when it finds the basic rule and its speed limits are greater or less than would be reasonable or safe on portions of highways. Section 61-8-304, MCA, is an exception to the power of the Department of Highways under section 61-8-309, MCA, as to speeds above that proclaimed in the attorney general's proclamation.

Section 61-8-310, MCA, gives local authorities power to alter the basic rule and speeds of section 61-8-303, MCA, when traffic and engineering investigations show urban speed limits to be greater or less than reasonable. Section 61-8-304, MCA, conflicts with section 61-8-310, MCA, as to speeds above the attorney general's proclamation.

Section 61-8-312, MCA, authorizes trucks and truck-tractors to be driven at speeds up to 65 miles per hour on interstate and divided lane highways and up to 60 miles per hour on sections of primary and secondary highway, except at nighttime. Section 61-8-304 conflicts with section 61-8-312, MCA, as to speeds above the maximum set by the attorney general's proclamation.

Since 1974, no attempt has been made by the legislature to clarify these conflicts. The other statutes were enacted after due legislative consideration. Yet the provisions of these other statutes, legislatively enacted, may be and are being set aside without further legislative action by the proclamation of the attorney general governed by changes in the federal law alone. The attorney general need not consider safety, conservation, assured clear distance of vision, type and structure of the highway, or any other fac-

tor that would lead to a reasoned legislative or administrative decision. He is mandated to act as the federal law requires with no discretion or fact-finding. His proclamation is as immutably attached to a federal action as is a saddle to a horse.

Thus we come to the essential invalidity of section 61-8-304, MCA. The authority conferred upon the attorney general in that statute is clearly an impermissible delegation of legislative authority. 1972 Mont. Const., Art. III, Sec. 1; Matter of Auth. to Conduct Sav. & Loan Act. Etc. (1979), _____ Mont. _____, 597 P.2d 84,36 St. Rep. 1207; Bacus v. Lake County (1960), 138 Mont. 69, 354 P.2d 1056.

Lee concedes that the legislature has the authority to adopt existing federal statutes or regulations in its enactments. We agree. See Wallace v. Commissioner of Taxation (1971), 289 Minn. 220, 184 N.W. 2d 588 (the statute adopted the federal definition of adjusted gross income for state income tax purposes).

The constitutional infirmity of section 61-8-304, MCA, arises out of its mandatory directions to the attorney general to proclaim a speed limit "not ... less than that required by federal law" "whenever the establishment of such a speed limit by the state is required by federal law" to receive federal highway funds. Under the 1974 act, and under the act as it now exists, the attorney general is also required to terminate such proclaimed speed limit "whenever such a speed is no longer required by federal law." Section 61-8-305 (2), MCA. A more blatant handover of the sovereign power of this state to the federal jurisdiction is beyond our ken.

Almost without exception, the cases which recognize the right of a legislature to adopt as a part of its enactments existing federal laws and regulations also except from that right any adoption of changes in the federal laws or regulations to occur in the future. Wallace v. Commissioner of Taxation, supra; People v. DeSilva (1971), 32 Mich. App. 707 189 N.W. 2d 362 (statute upheld on ground of severability); Cheney v. St. Louis Southwestern Railway Co. (1965), 239

Ark. 870, 394 S.W. 2d 731; Idaho Savings & Loan Association v. Roden (19160), 82 Id. 128, 350 P.2d 225; Seale v. McKennon (1959), 215 Or. 562, 336 P.2d 340; Dawson v. Hamilton (Ky. 1958) 314 S.W.2d 532; State v. Urguhart (1957) 50 Wash. 191, 310 P.2d 261; Brock v. Superior Court (1937), 9 Cal. 2d 291, 71 P.2d 209, among others.

Three states have upheld legislation similar to Montana's and denied constitutional challenges to statutes incorporating federal speed limits. Masquelette v. State (Tex. Crim. 1979), 579 S.W. 2d 478; State v. Dumler (1977), 221 Kan. 386, 559 P.2d 798; State v. Padley (1976), 195 Neb. 358, 237 N.W. 2d 883. All three can be distinguished from this case by the terms of the Montana statute. In the other three cases, either the legislature pegged the speed limit, or the power granted to a state official or body to adopt speed limits was couched in permissive instead of mandatory terms. No state that we can find has approved a delegation of sovereign power involved here for mandatory action in the future, based upon the federal law.

The state further argues that in any event, if we were to determine that the ability of the attorney general in the future to change the maximum speed limits is unconstitutional, nonetheless, the statute can be saved by declaring that portion severable so as to preserve the constitutional validity of the rest of the act. However, there is no severability clause either in Ch. 60, Laws of Montana (1974), or in Ch. 421, Laws of Montana (1979), Sec. 66, where this statute was enacted and re-enacted. Moreover, the power of the court to sever an unconstitutional portion cannot be effectively exercised in this case because the attorney general's proclamation must issue "whenever" the federal law changes, and must terminate whenever the federal requirement ceases. There is no comfort for the state therefore in severability.

We want to state clearly that had the legislature itself established the speed limit originally or at any subsequent session, we should then have found such enactment constitutional, even though it may have been in reponse to the

federal requirements. Moreover, we see no constitutional infirmity, if an emergency of the sort presented here arose, in granting such proclamation power to a state official, if it were only for the interim between legislative sessions. The evil we find in the present legislation is the permanent delegation of the legislative sovereign power.

We consider now the effect of our determination that this legislation is invalid. We invite chaos to our highway system, and grave damage to the economy of our state, if because of this decision the federal funds were to be shut off. The maximum speed limit of 55 miles per hour is in harmony with the national goal of conservation of gasoline and oil, and with improved saftey. It is imperative for the best interests of the state that the maximum speed limit be continued until the legislature has had a chance to act, and that law enforcement officers continue the enforcement thereof until valid legislation is enacted.

We have the power as an appellate court to order the effect of our decision to be retrospective or prospective, and in effect, to postpone the effective date of our decision. Such action is in order here.

Accordingly, the decision of the District Court that section 61-8-304, MCA, as now constituted is a valid constitutional act is reversed. We declare that statute to be unconstitutional. This opinion shall have the force and effect of a declaratory judgment to that effect in favor of the plaintiff, Gary Lee. We postpone the effective date of this decision and judgment to October 1, 1983, or to such earlier date as the legislature may enact and the governor approve maximum speed limit legislation comporting with the federal requirements and complying with out state constitution. Until such date, violations of the maximum speed limit as proclaimed by the attorney general on March 2, 1974, shall continue to constitute offenses pursuant to section 61-8-718 and section 61-11-103, MCA. We retain jurisdiction of this cause until the further order of this Court. Costs to plaintiff.

Appendix B

## SUPREME COURT OF THE STATE OF MONTANA

GARY LEE
Plaintiff

v.

STATE OF MONTANA
Defendant

### ORDER ON PETITION FOR REHEARING

Submitted without oral argument.

Order by Justice Sheehy; Chief Justice Haswell and Justices Harrison and Weber concurred. Justices Daly and Shea concurred. Justice Morrison concurred.

Petition denied.

### ORDER

### ON PETITION FOR REHEARING:

The Attorney General of the State of Montana, as chief legal officer of the State, has petitioned this Court for a rehearing limited to that portion of our opinion promulgated October 22, 1981, in the above cause which postpones the effective date of the decision to October 1, 1983. Counsel for State Senator Gary Lee has not responded to the petition, which we take to be tacit consent.

The Attorney General requested in his petition that it be submitted without oral argument. In the absence of oral

argument and discussion in open court, it is apropriate for us to set forth here a more extensive discussion of the reasons for and validity of our postponement than is found in the original opinion.

The Attorney General grounds his petition on the argument that (a) an unconstitutional statute continued in effect is contrary to a long line of precedent established by this Court, and (b) it creates problems for him, as a constitutional officer, to enforce the law according to our opinion.

The dismay of the Attorney General and the dispraise of editors that has followed our postponement decision arise from a misinterpretation of the modern trend of judicial thought on the effect of the nullity of a statute.

In his petition, the Attorney General quoted from our decision in State v. Coleman (1979), _____ Mont._____ _____, 605 P.2d 1000, 1013, 36 St. Rep. 1134, 1144 (authored by this writer), wherein we stated:

"There exists a rule of statutory construction that a statute declared unconstitutional is considered void **ab initio** and has no effect. This proposition is best typified by the following statement of Justice Field in Norton v. Shelby (1886), 118 U.S. 425, 4423, 6 S. Ct. 1121, 30 L.Ed. 178: 'an unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.'"

The above quotation set forth by the Attorney General in his petition is not complete. Our opinion there goes on to state that this Court would not follow the Blackstonian rule set forth in **Norton**, and in **Coleman**, we cited those cases which showed the modern trend with respect to the nullity of statutes considered unconstitutional, including Lemon v. Kurtzman (1973), 411 U.S. 192, 198-199, 93 S. Ct. 1463, 36 L. Ed 2d 151; Linkletter v. Walker (1965), 381 U.S. 618, 85 S. Ct. 1731, 14 L. Ed. 2d 601; and Chicot County Drainage District v. Baxter State Bank (1940), 308 U.S. 371, 374, 60 S. Ct. 317, 84 L.ed. 2d 329.

A review of those cases set forth in **Coleman** would

have demonstrated the modern view.

The case underlying, the Supreme Court **Lemon** case, supra, is Lemon v. Kurtzman (E.D. Penn. 1972), 348 F. Supp. 300. That case is most instructive with respect to the power of postponement. In that case, the Pennsylvania Legislature had enacted a provision which provided for payments to church-related schools for services performed in education in Pennsylvania. The act was challenged in the United States Supreme Court, in Lemon v. Kurtzman (1971), 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745, where the act was found to be unconstitutional. The case was remanded to a three-judge district court. The question before the three-judge court was whether Pennsylvania could, under the unconstitutional act, make payments to the church-related schools for the school year 1970-1971. The three-judge district court decided that the church-related schools had entered into budgetary arrangements based on the allocations which they were supposed to receive under the act. In order to avoid a hardship, the three-judge court decreed on December 28, 1970, that it would enter summary judgment in favor of the parties attacking the act but it would restrain payments for services performed by the church-related schools only for any period subsequent to June 28, 1971. In the meantime, payments were to be made to the church-related schools pursuant to the newly decided unconstitutional act.

The parties attacking the act had asked the district court to espouse the view that had been set forth in **Norton**, which we included in the **Coleman** citation above. The district court said:

"Plaintiffs espouse the 'Blackstonian' view which is followed by the Supreme Court in Norton v. Shelby County [citation] wherein the court held that an unconstitutional statute 'confers no right; it imposes no duty; it affords no protection; it creates no office; it is in legal contemplation as inoperative as though it had never been passed.' [Citation.] The general rule underwent a gradual erosion, culminating in the 1930's with Great Northern Railroad Company v.

Sunburst Oil and Refining Company, 287 U.S. 358, 53 S. Ct. 145, 77 L.Ed. 360 (1932) and Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371, 60 S. Ct. 317, 84 L. Ed. 329 (1940). In **Great Northern** the Court rejected the argument that the constitution was abridged by the lower court's refusal to apply its ruling retrospectively, holding at page 364 of 287 U.S. at page 148, 53 S. Ct. ____ ____:

"'We think the federal constitution has no voice upon the subject. A state in defining the limits of adherence to precedent may make a choice for itself **between the principal of forward operation and that of relation backward**. It may say that decisions of its highest court, though later overruled, are law nonetheless for intermediate transactions. Indeed there are cases intimating, too broadly, [citing a case] that it must give them that effect; but never has doubt been expressed that it may so treat them if it pleases whenever injustice or hardship will thereby be averted.'" 348 F. Supp. at 302. (Emphasis added.)

The federal district court in **Lemon** went on to point out the further effect of Linkletter v. Walker, supra:

"Whatever vestige of the 'Blackstonian' view of absolute retroactive activity remained after **Great Northern** and **Chicot** was ultimately laid to rest by the Supreme Court in Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965), wherein the court held 'the accepted rule today is that **in appropriate cases the Court may, in the interest of justice make the rule prospective.**' 381 U.S. 628, 85 S. Ct. 1737." 348 F. Supp. at 303. (Emphasis added.)

The payment feature of the decision of the federal district court in **Lemon** was appealed again to the United States Supreme Court, where it was approved in Lemon v. Kurtzman (1973), 411 U.S. 192, 93 S. Ct. 1463, 36 L.Ed. 2d 151. The Supreme Court affirmed the decision, allowing the payments to be made to the church-related schools upon the ground of reliance and equity. 93 S.Ct. at 1471.

There can be no doubt in this case that the State High-

way Department relied on, and is now relying upon the efficacy of section 61-8-304, MCA, to assure the continued receipt of federal highway funds.

In our principal opinion in the case at bar, we asserted the power of the legislature to grant interim authority regrding speed limits. We said:

"We want to state clearly that had the legislature itself established the speed limit originally or at any subsequent session, we should have then found such an enactment constitutional, even though it may have been in response to the federal requirements. Moreover, we see no constitutional infirmity, if an emergency of the sort presented here arose, in granting such power to a state official, if it were only for the interim between legislative sesions. The evil we find in the present legislation is the **permanent delegation** of the legislative sovereign power." (Emphasis added.) 38 St. Rep. at 1735.

Our postponement is no different and of no greater effect than an interim grant of power to the Attorney General by the legislature, which we would hold to be constitutional. The bane we found was not the delegation of legislative power to the state official in itself, but the **permanent delegation** of such power to change, or abolish, the speed limits. Our objection was to the **form** of the enactment, not to the **power** of the legislature to make such an enactment. It is only when a law is invalidated on the ground of lack of such **power** that a statute, and correlative rights acquired thereunder become a nullity. City of Winter Haven v. A. M. Klemm & Son (Fl. 1938), 181 So. 153, 165.

There were some "hard facts" (**Coleman,** supra) which shaped our postponement decision in this appeal. We faced a Hobson's choice in this case. If we had simply declared the statute invalid with nothing more, we would then be presiding over the dismantling of the state highway system in exchange for allowing State Senator Gary Lee to drive his automobile between Great Falls and Ft. Shaw at speeds in excess of 55 miles per hour., We had competing interests to be balanced here, but the continued safety and welfare of the

traveling public on good highways far overweighed, in our judgment, Senator Lee's impatience with the federal speed limit. The writer hereof seems to have misinterpreted Senator Lee's motive in bringing the suit: it had appeared that he wanted the legislature to face up to its duty regarding speed limits, more than he wanted to tramp down on his accelerator. At any rate, by postponing the effective date of our decision, we fashioned a method to reach a proper decision as to the invalidity of section 61-8-304, MCA, and at the same time to assure the flow of federal highway funds until the legislature could act.

Our decision, therefore, to postpone the effective date of the principal opinion in this case to October 1, 1983 is well within the power of this Court and accepted precedent respecting the effect of nullity of statutes. We selected October 1, 1983, because on that date statutes enacted in 1983 session, the next regular session of the legislature, will become effective.

We reject the contention that in so postponing, we were in effect legislating. Rather we were preserving the right of the legislature itself to act calmly and without duress. It may well be that the legislature may refuse to adopt a speed limit within the federal guidelines, but that will be a legislative decision, not ours. We see no reason to force the legislature into considering a speed limit in a special session. Truly, the speed limit law is not the most important issue facing the legislature in these troubled times.

There remains the concern of the Attorney General that because of our postponement, there will be an increase in litigation challenging the speed limit enforcement. It was to obviate any such difficulty that we retained jurisdiction of this cause in our original decision, and continue to retain such jurisdiction. Any such challenge to the enforcement of the statute prior to the effective date must perforce come to us, where, we assure the Attorney General, it will be given short shrift.

The petition for rehearing is DENIED.

. . . . .

Mr. Justice Morrison, concurring:

I fully support the position of the Court, but wish to add a few comments to Justice Sheehy's opinion denying the State's "petition for rehearing".

The Attorney General's apparent confusion over the court's decision indicates need for clarificatin. This Court has clearly acted within its legitimate constitutional reach. The law must be enforced.

A statute can be unconstitutional on its face or unconstitutional in its application. If a statute is unconstitutional in its application the court may choose, at its option, to permit the statute to continue until the unconstitutional aspect of the statute is activated.

The statute in question can and did legitimately adopt a federal guideline in existence at the time of the statute's enactment. The result is a 55 mile an hour speed limit.

The statute in directing the Attorney General to conform Montana's speed limit to federal requirements, contains an unconstitutional delegation of authority to the federal government; however, that authority had not been acted upon. Should congress change the speed for federal fund eligibility, the Montana speed limit would automatically change without action on the part of Montanans or their elected representatives. This is the evil but it has yet not occurred. The 55 mile an hour aspect, together with the $5.00 sanction, is enforceable.

The statute with which we are here concerned is not void **ab initio**. The defect cannot be severed because it is integrated in the statute. Nevertheless, since the statute is not void from its inception, this Court has the inherent equitable power to allow the statute's enforcement prospectively.

Should the Congress of the United States change the 55 mile an hour speed limit, thereby activating that provision of Montana law which provides for an automatic change in

the Montana speed limit to accommodate such congressional action, then, and at that time only, would a problem arise. It is questionable that this Court could suspend operation of its judgment past that point.

In summary, the statute unconstitutionally delegates state power to Congress, but Congress has not acted so as to trigger the faulty provision of state law. The statute adopted a federal standard in existence at the time of the statute's enactment and that standard is enforceable. The Attorney General should continue to enforce the law pursuant to the command of this Court.

# Opposition

81-1528

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NO. _____

In The

# Supreme Court of the United States

October Term, 1981

GARY LEE,

*Petitioner,*

vs.

THE STATE OF MONTANA,

*Respondent.*

**Petition For A Writ Of Certiorari To The Supreme Court Of Montana**

## RESPONDENT'S BRIEF

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## QUESTION PRESENTED

Whether the Montana Supreme Court has violated federal due process by ordering the continued enforcement for a two year period of a state statute which the court has found unconstitutional.

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NO. _____

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GARY LEE,

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vs.

THE STATE OF MONTANA,

*Respondent.*

**Petition For A Writ Of Certiorari To The Supreme Court Of Montana**

## RESPONDENT'S BRIEF

The respondent, State of Montana, respectfully requests that this Court grant the petition for writ of certiorari seeking review of the Montana Supreme Court's opinion in this case. The decision is reported at 38 St. Rptr. 1729, 635 P. 2d 1282 (1981). The denial of rehearing is not reported. Both decisions appear in the Appendix to the Petition.

## OPINIONS BELOW

Petitioner misstates the decision by the Eighth Judicial District Court of the State of Montana, in and for the County of Cascade. The lower court declared section 61-8-304, Montana Code Annotated (hereinafter MCA), constitutional, not unconstitutional as petitioner states.

## SUMMARY OF ARGUMENT

The decision of the Montana Supreme Court in the instant case violates the due process clause of the Fourteenth Amendment. The court below ordered the continued enforcement, for a two year period, of a statute it found constitutionally defective. The court retained jurisdiction in the matter so that it could summarily dispose of any legal challenge to this order of enforcement. The enforcement of an unconstitutional statute in combination with the elimination of legal channels of protest violate federal due process.

The court below found support for its decisions in United States Supreme Court precedent. The doctrine of nonretroactivity as articulated in *Lemon v. Kurtzman*, 411 U. S. 192 (1973), and its predecessors, was extrapolated to uphold the two year delay in effectuating the decision. These cases have been misapplied. The issue of the limits of prospectivity which due process tolerates is one of first impression for this Court. To allow the decision below to stand is to encourage "equitable" decision making despite clear findings of unconstitutionality. The economic reasons on which the court below based its de-

cision do not adequately uphold its ruling. Respondents encourage this Court to grant the petition and resolve the issue presented.

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## REASONS WHY THE WRIT SHOULD BE GRANTED

### 1. The decision below raises a substantial federal question.

The respondent must agree with petitioner's request that a writ of certiorari be granted in this case. The ruling of the Montana Supreme Court is without authority and sets a dangerous precedent. The decision violates the due process rights of all drivers on Montana highways. In addition, the authority cited by the court in its denial of rehearing, *see* Petition, Appendix B, clearly misuses this Court's precedent and results in the enforcement of an unconstitutional statute for up to two years.[1]

The opinion below ruled the Montana 55 m.p.h. speed limit statute, section 61-8-304, MCA, unconstitutional. The court found that statute violated Article III, section 1 of

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1 The decision rendered October 22, 1981, made the effective date "of this decision and judgment October 1, 1983, or such earlier date as the legislature may enact and the governor approve maximum speed limit legislation comporting with the federal requirements and complying with our state constitution. Until such date, violations of the maximum speed limit as proclaimed by the attorney general on March 2, 1974, shall continue to constitute offenses. . . ." 635 P. 2d at 1287.

the Montana Constitution.[2] Despite this finding the court ordered the statute enforced until October 1, 1983, or until new legislation could be enacted. This latter ruling violates the very concept of due process. The due process clause of the Fourteenth Amendment provides that "no person shall be deprived of life, liberty or property without due process of law." U. S. Const. amend. XIV. This Court has acknowledged that "due process has never been, and perhaps never can be, precisely defined," *Lassiter v. Department of Social Services of Durham County*, 452 U. S. 18, 24 (1981), but recognizes that one of the basic purposes of the due process clause is "to protect persons against having government impose burdens upon individuals *except in accordance with valid laws of the land.*" *Giaccio v. Pennsylvania*, 382 U. S. 399, 403 (1966). (Emphasis added.) The Montana court is imposing on the citizens of the state the burden of an unconstitutional statute. Violators will continue to be penalized under the terms of the statute and any attempt at legal protest of such enforcement has effectively been abrogated. In its rehearing order the court spells out its position:

> There remains the concern of the Attorney General that because of our postponement, there will be an increase in litigation challenging the speed limit enforcement. It was to obviate any such difficulty that we retained jurisdiction of this case in our original decision, and continue to retain such jurisdiction. *Any*

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2 Montana Constitution Article III, section 1 provides: Separation of powers. The power of the government of this state is divided into three distinct branches—legislative, executive, and judicial. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.

> *such challenge to the enforcement of the statute prior to the effective date must perforce come to us, where, we assure the Attorney General, it will be given short shrift.*

Rehearing Order at p. 6, *Lee* petition at Appendix B-6. (Emphasis added.) The burden affected by this order certainly violates the dictates of due process. An unconstitutional statute is being enforced to the detriment of the citizens of the state and the only method of protest, the legal process, is short circuited by the court's declaration that such challenges are to be disposed of summarily. The principles of equity which underlie this order do not support a delay in justice at the expense of the citizenry. The right to be free from the court-ordered enforcement of unconstitutional statutes is certainly within the concepts of ordered liberty. *See Palko v. Connecticut*, 302 U. S. 319, 325 (1937).

The court below supported its decision by misapplying precedent established by the United States Supreme Court. The question raised by such misinterpretation (p. 2) is whether the doctrine of "nonretroactivity" includes the power to hold the effective date of a decision in abeyance for two years. In the instant case, the court ruled that the doctrine of nonretroactivity this Court espoused in *Lemon v. Kurtzman*, 411 U. S. 192 (1973), and its predecessors, supports the proposition that, given the proper equitable circumstances, an unconstitutional statute may remain in effect for two years. While it is true that prospective application of precedent-setting decisions is increasingly used, this Court is faced with a case of first impression. Nowhere has the term "prospective" been clearly defined. This Court has stated "[a] ruling

which is purely prospective does not apply even to the parties before the court. *See, e. g., England v. Louisiana State Bd. of Medical Examiners,* 375 U. S. 411 (1964). See also *Great Northern R. Co. v. Sunburst Oil & Refining Co.,* 287 U. S. 358 (1932)." *Linkletter v. Walker,* 381 U. S. 618, 621-22 (1965). The *Lemon* Court acknowledged that a state "in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward." 411 U. S. at 200, n. 2 (citing *Great Northern R. Co.,* 287 U. S. at 364). A two year delay in implementing a decision, however, poses the question of the limits of prospectivity in light of due process considerations. The cases cited above provide no support for a two year delay.

In *Lemon,* 411 U. S. 192 (1973), this Court upheld a district court decision permitting Pennsylvania to reimburse nonpublic schools for services rendered and costs incurred under a statutory scheme prior to its invalidation. The appellants argued that no payments should be made, i. e., that the effective date of the decision should relate back to the enactment of the statute and foreclose any payments. In *England,* 375 U. S. 411 (1964), the Court articulated a new rule affecting an individual's right to access to federal district court. The rule was not applied to the appellants, however, because the Court found they acted reasonably under the previous case law in filing in district court. The *Great Northern* case as well as the *Linkletter* decision involved other questions of retroactivity. In all the cases, once the decision against retroactivity was made, the question of prospectivity arose. Should the individuals involved in the precedent case be bound by its rule? If they were not bound, the Court es-

tablished some point in the *immediate* future at which the decision became effective. E. g., in *Linkletter,* the Court ruled that the *Mapp* exclusionary rule was not retrospective. The rule applies only to state court convictions which became final after the *Mapp* judgment was rendered.

The Montana Supreme Court has used the decisions of this Court to open wide the door of prospectivity. The possible applications of this doctrine are innumerable. The decision below stands for the proposition that economic reasons[3] alone support the enforcement of an unconstitutional statute for a two year period. Although questions of retroactivity or prospectivity are equitable in nature, *Lemon,* 411 U. S. at 200, the fact remains that courts are empowered to uphold only those statutes which meet constitutional requisites. To allow an unconstitutional statute to be imposed upon the citizenry of a state is to mock the very constitution it violates. The Montana Supreme Court used the principle of forward operation to circumvent its own findings by delaying its holding of unconstitutionality. The requisites of due process cannot withstand such an assault. The risks posed by allowing such loose interpretations of the doctrine of prospectivity overshadow any possible benefit. Where, as here, the very concepts of due process are violated by misapplication of federal precedent, this Court must take action. To allow the precedent to stand is to invite lower courts to invent "equitable" reasons for enforcing unconstitutional statutes.

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3 The Court in *Lee* found that "we invite chaos to our highway system, and grave damage to the economy of our state, if because of this decision the federal [highway] funds were to be shut off." 635 P. 2d at 1287.

Such statutes may not involve the relatively minor problem of traffic regulation but instead affect more crucial aspects of individual lives.

## CONCLUSION

For the above reasons the petition for a writ of certiorari should be granted.

Respectfully submitted.

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